Reproductive Hazards in the Workplace: Bearing the Burden of Fetal Risk

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IN 1979 AMERICANS LEARNED THAT FIVE WOMEN employed at the Willow Island plant of the American Cyanamid Corporation had subjected themselves to sterilization in order to keep their jobs (*New York Times,* 1979). A year earlier, the company had informed its female employees that those who were working with substances that might endanger their fetuses if they became pregnant would have to be transferred to other jobs (American Cyanamid, 1980). Since, in Cyanamid's view, it was impossible to eliminate the risk, only removal could protect these women and their potential children. The jobs to which they were shifted involved lower pay rates, without the possibility of overtime earnings; as a result, five of the women chose sterilization—the only condition under which they could be returned to their previous assignments. For American Cyanamid, exclusionary policies were required for moral reasons and because of the risk of tort liability. The potential fetus had the right to be protected from injuries that might result from maternal exposure to workplace toxins. The company had the right to protect itself from economically injurious lawsuits charging it with responsibility for harm to the fetus linked to the mother's workplace.

Willow Island thus became a symbol of a new and very bitter phase

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in the struggle between workers and corporations over the question of occupational health and safety. But in this case a second feature made the confrontation all the more acrimonious. Women who, as a result of civil rights legislation and court action, had begun to break the male monopoly over relatively high-paying blue-collar jobs were now being threatened with dismissals, demotions, or barriers to employment in the name of fetal health. Corporate policies put forth in the name of fetal protection echoed the recently discredited arguments of the years when women were excluded from often better-paying jobs because they were deemed to require special protection. Once again, women were to be barred from jobs that might compromise their capacities to bear healthy children. Once again, they were to be restricted because they bore a special obligation to future generations, to the "race." Responding to this challenge, a broad coalition of feminist, labor, civil rights, and civil liberties organizations created the Coalition for Reproductive Rights of Workers (CRROW).[1] "No more Willow Islands" was the cry (Coalition for Reproductive Rights of Workers, 1981).

Questions of great importance are at stake in the clash between corporate interests that have pressed for exclusionary employment policies and those groups that have opposed them. How shall society respond to the risks of childbearing under conditions of work-related toxicity? How shall the burdens associated with such risks be distributed? Must the intrinsically private functions of conceiving and giving birth to a child be thought of as involving only personal obligations? Should those who benefit from the labor of fertile workers—the owners and managers of the production system and the society that depends upon that system for survival—be made to shoulder those costs? Scientific data about maternal and paternal contributions to fetal health, moral arguments about the vulnerability of

[1] Among the members of CRROW are: Amalgamated Clothing and Textile Workers Union, International Brotherhood of Painters and Allied Trades, International Chemical Workers Union, United Auto Workers, United Rubber Workers, United Steelworkers, Coalition of Black Trade Unionists, Coalition of Labor Union Women, American Civil Liberties Union, Center for Constitutional Rights, Center for Law and Social Policy, National Lawyers Guild, Committee for Abortion Rights and Against Sterilization Abuse, League of Women Voters, National Organization of Women, Women's Legal Defense Fund, Alan Guttmacher Institute, and Planned Parenthood Federation of America.

women workers and unborn children, economic analyses of the potential cost of alternative social and industrial policies have all been drawn into the argument. Each has appeared in the service of the antagonists in this controversy. Each warrants attention. But only an analysis that locates these elements in the context of the clash of social interests in the struggle over reproductive hazards in the workplace can provide an adequate basis for their understanding.

Fetal Risk, Women Workers, and Corporate Policy: The Rise of a Controversy

Exclusionary policies like those of American Cyanamid have been adopted at many corporations, most notably in the petrochemical sector of the economy. Among those that have moved to bar women from certain jobs are dominant firms such as Dupont, General Motors, B. F. Goodrich, Olin, Sun Oil, Gulf Oil, Union Carbide, Allied Chemical, and Monsanto (*California Law Review*, 1977; Bertin, 1982). More importantly, every chemical company surveyed by the trade journal *Chemical and Engineering News* maintained, at least in principle, that no women biologically capable of bearing children should be exposed to fetotoxins, substances that pose a direct risk to the health and viability of the unborn child (Rawls, 1980a). Estimates of the number of jobs foreclosed to women because of such policies range upward from a conservative 100,000 (Williams, 1981).

Given the list of industrial substances with fetotoxic potential—benzene, lead, vinyl chloride, carbon tetrachloride, and carbon monoxide, for example (Williams, 1981)—the scope of such exclusions, if consistently applied, would have an extraordinary impact on the ability of women to work. As many as twenty million jobs—from the labor-intensive craft industry to the technologically advanced sector of the economy—might be involved (Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, 1980). Any effort to extend exclusionary policies to those sectors of the economy, e.g., the health care industry, where females make up the vast majority of the labor force, would be especially disruptive to the economy and to the economic well-being of women workers.

Corporate medical directors, aware of the furor generated by policies that restrict women's employment opportunities, have asserted that such policies do not express a paternalistic concern for the reproductive capacities of their workers. Bruce Karrh of Dupont stated: "When we remove a woman, it is not to protect her reproductive capacity, but to protect her fetus" (*New York Times*, 1981). Some believe that all fertile women must be excluded because of the potential cost of reducing exposure levels to the point at which the fetus would no longer be at risk. Perry J. Gehring, Director of Health and Environmental Services at Dow Chemical, made this point in justifying his own corporation's perspective: "The difficulty and cost of implementing good industrial hygiene shouldn't be used as a blanket excuse to exclude women. But if the cost is going to rise exponentially to reach a certain level for uniquely fetal toxins, it's justified to take a woman out of the workplace then" (*Wall Street Journal*, 1979). Others have adopted a less flexible stance, asserting that since the dose-response curve for the fetus is unknown, corporations must exclude those who might become pregnant. Robert Clyne, formerly Corporate Medical Director at American Cyanamid, argued that in the face of uncertainty no other choice was defensible: "Threshold limit values for fertile females were arrived at solely by professional and educated guessing and certainly are not based on clinico-laboratory experience. We admit that we are ultraconservative" (Bertin, 1982).

Since so much of the public interest in exclusionary policies has centered on reports of elective sterilizations of women seeking to keep their jobs, representatives of the corporate world have sought to deny any responsibility for those choices. Jack Kendrik, President of Bunker Hill, rejected the charges of corporate critics, asserting: "Certainly no one is required to be sterilized." He found it hard to believe that any woman would have a job-related reason to even contemplate sterilization (Gold, 1981).

The picture is very different for the women who have chosen sterilization and for their allies in the struggle against corporate exclusionary policies. For them, a direct line of responsibility runs from the decision to bar fertile women from jobs to the "choice" of sterilization. A woman might elect, of course, to accept some lesser assignment or the prospect of a continued job search. But that did not make the situation one of freedom; rather, such choices were coercively structured. One worker underscored this point by stating:

"They don't have to hold a hammer to your head—all they have to do is tell you that it's the only way you can keep your job" (Bertin, 1982).

Feminists recognized the seriousness of the challenge represented by the turn toward exclusion. In the journal *Feminist Studies,* Rosalind Petchesky (1979) argued that the focus on fetal rights had "brought us back to the Victorian notion that woman's childbearing *capacity*—in short, her biology—should determine where and whether she may work." For her, the aim of corporate policy was not to protect the woman worker or her potential child, but was rather to reverse the gains made as a result of the enactment of Title VII of the Civil Rights Act. Resulting from a reassertion of the sexual division of labor and of the subordination of women, the sterilizations of Willow Island thus became a punishment for the challenge to male occupational prerogatives—"a coercively imposed alternative to motherhood" (Petchesky, 1979).

The empirical bases for exclusionary policies derive from a recognition of the special vulnerability of the developing fetus and from assumptions about the special role of the maternal contribution to fetal viability and health. Because so little is known about the dose-response curve for fetotoxicity, some have argued that only a zero level of exposure can assure safety. Since important aspects of the developmental process occur in the early weeks after conception, before a woman may know she is pregnant, supporters of exclusion have also maintained that only the removal of all fertile women can prevent the accidental exposure of the fetus (Rawls, 1980).

Though much of the work on mutagenesis and teratogenesis[2] has centered on the maternal role, researchers have shown increasing interest in the male contribution to negative reproductive outcomes.[3] Such concern has focused not only on reduced libido and on sperm production, morphology, and motility (of primary importance to conception itself), but on mutagenesis as well (Manson and Simons,

[2] Mutagenesis involves any negative effect on the genetic material of the male or female germ cell. Teratogenesis, on the other hand, involves a direct harmful impact on the developing organism usually at very early stages of development.

[3] A discussion of the methodological difficulties involved in studying the impact of industrial exposure on male reproductive capacity is found in Murray (1982); for discussion of the negative consequences of the toxic exposure of males, see Berg (1979).

1979). Negative effects on male gene cells result most often in spontaneous abortions. However, if conception does take place, teratogenic consequences may also occur. For example, some have suggested that semen may serve as a medium for the excretion of chemical agents which may then be absorbed during intercourse through the vaginal mucosa (Council on Environmental Quality, 1981). Such absorption in a pregnant woman could affect the health of the embryo or fetus.

After reviewing the evidence, the Council on Environmental Quality concluded that the scientific basis for treating men and women differently, because of potential reproductive outcomes, was limited. Noting that reproduction involves a wider range of processes in the female than in the male, the Council stated: "It does not necessarily follow that women are more sensitive to the action of any given agent." When extensive data were available, as in the cases of smelter emissions and anesthetic gases, they indicated adverse effects on both women and men; they also showed some evidence of harm to the fetus following the exposure of males (Council on Environmental Quality, 1981).

For the Occupational Safety and Health Administration (OSHA), under the leadership of Eula Bingham, the turn toward exclusionary policies represented a grave assault on the right of all workers to safe working environments. Especially vulnerable workers could not be barred from worksites that might be safe for those within the normal range. As a matter of principle, OSHA under the Carter administration had asserted that safety and health standards had to protect even the most vulnerable. Industry had sought to justify its exclusionary practices by classing all fertile women and the fetuses of pregnant women as "hypersusceptibles." To OSHA, both the scientific bases and the logic of this effort were unacceptable. Unlike those who claimed that the fetus was vulnerable only through maternal exposure, OSHA found the evidence of paternal effects convincing enough to warrant a challenge to conventional assumptions (Bingham, 1980).

Anthony Robbins, Director of the National Institute of Occupational Safety and Health, shared the concerns of Bingham and her colleagues. In a letter to B. F. Goodrich he wrote: "We must stand firm on the principle that if an exposure is sufficiently toxic to produce genetic damage in an unborn child or in a fertile female, then it must be considered to be equally toxic to the fertile male worker and to his unborn child. . . . There is *a priori* no reason to believe that the

genetic material of a male worker is in any way more resistant to toxic occupational injury than that of the female" (Rawls, 1980a).

Any protection required by the fetus because of its special vulnerability should not be purchased at the expense of its mother, OSHA believed. Rather, exposure standards had to be set at a level that recognized that vulnerability. Furthermore, reproductive capacity was an element of a worker's health that should not be endangered by policies making childbearing capacity an impediment to employment. A senior policy analyst at OSHA argued: "You do not protect workers by inducing them to harm themselves" (Rawls, 1980a). Corporate policies that made it possible for a woman to exchange her reproductive capacity for a job—to choose sterilization as a condition for employment—were coercive. The conditions of the labor market made elective sterilization voluntary in form only. Eula Bingham dismissed the arguments of corporate officials who denied any role in workers' decisions to opt for a surgical end to their childbearing capacities: "No worker must be forced to sacrifice his or her right to conceive children in order to hold a job" (Rawls, 1980a).

Given this perspective, OSHA's decision to enter the conflict at American Cyanamid was not unexpected. Interpreting the Occupational Health and Safety Act broadly, OSHA charged, in October 1979, that the corporation's policies had involved a violation of the act's general duty clause, which requires that "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . ." (Occupational Safety and Health Act, 1970). The sterilization, chosen by five women, was a work-related injury to their reproductive capacities (*Family Planning/Population Reporter*, 1981).

Ten months later William E. Brennan, an administrative law judge of the Occupational Safety and Health Commission, dismissed OSHA's citation on technical grounds, asserting that the suit had not been filed in a timely fashion (*New York Times*, 1980). The Department of Labor appealed that decision, but again OSHA lost the case (Secretary of Labor v. American Cyanamid, 1981). In a two to one ruling on April 28, 1981, the Federal Occupational Safety and Health Review Commission held that the General Duty clause did not extend to Cyanamid's fetus protection policy. The majority rejected the contention that OSHA's mandate, which protected the physical integrity of em-

ployees "while they are engaged in work-related activities," could be extended to elective sterilization. Unlike those who viewed the choice of sterilization as the product of corporate policy, the majority held that a worker's decision to give up her ability to bear children in order to retain her job "grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates those factors. . . ." In a stinging dissent, one commissioner held that the majority had made an unduly restrictive interpretation of the OSH Act and thereby had placed American workers beyond the protection of the law. "One fact is inescapable in this case. Five American Cyanamid employees have been sterilized. As a matter of law, this irreversible termination of their childbearing capacities is a material impairment of functional capacity resulting from a condition of employment imposed by their employer." Rejecting the logic of the majority, the dissent could see no distinction between the fetus protection policy and the willful exposure of workers to toxic substances. "Corporate policy that offers employees a choice between jobs and surgical sterilization is comparable to corporate policy that offers employees a choice between jobs and exposure to sterilizing chemicals." Both the letter and the spirit of the act prohibited the former as certainly as they prohibited the latter.

The Government's Reaction: Guidelines on Employment Discrimination and Reproductive Hazards

Confronted with the emergence of exclusionary policies and practices, fearful of their extension to broader sectors of the economy, and responding to the pressure of their natural political constituencies, the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Occupational Safety and Health Administration began discussions about an appropriate regulatory response. At stake was the complex question of fashioning a policy directive that was mindful of the imperatives of the Civil Rights Act's protection of women, and legislative mandates regarding the protection of the health and safety of all workers. On February 1, 1980, EEOC and OFCCP issued their Interpretative

Guidelines on Employment Discrimination and Reproductive Hazards. These guidelines were explicitly set against a background of earlier expressions of concern by EEOC and OSHA's administrator, Eula Bingham, regarding the discriminatory impact of corporate policies that sought to exclude all fertile women from certain jobs in the name of reproductive and fetal health. Designed to provide employers, contractors, and the general public with "policy guidance" consistent with civil rights law, the guidelines sought to restrict severely the circumstances under which women could be denied employment because of their childbearing capacities. By posing a challenge to the emerging pattern of corporate policy, the guidelines sought to provide women workers with institutional support for their efforts to roll back what was perceived as a threat to hard-won employment rights.

Underlying the approach of the guidelines to the issue of reproductive hazards in the workplace was a profound skepticism about the scientific justification for exclusionary practices that sought to protect the unborn child exclusively through restrictions on the employment of fertile women. Unlike those who argued that the weight of scientific evidence made clear the necessity of protecting the fetus through the mother, the guidelines held out the importance of paying due heed to the paternal contribution to negative reproductive outcomes. Given this assumption on the part of the drafters of the guidelines, it followed quite naturally that policies directed at women alone would be unacceptable. "If the hazard is known to affect the fetus through either parent, an exclusionary policy directed only at women would be unlawful under Title VII [of the Civil Rights Act]" (Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, 1981).

There was a further and perhaps more striking rejection of the assumptions underlying corporate exclusionary policies. The guidelines rejected the proposition that even in those instances where it could be shown that the protection of the fetus required the exclusion of the mother, a policy restricting the work of all fertile women was necessary. Women workers were not to be treated as if they had no control over their reproductive functions. They were not to be treated as if their potential for pregnancy rendered them functionally, perpetually pregnant. Henceforth, it would be only permissible to fashion narrowly tailored exclusionary policies. Only pregnant women might be the target of such protective actions. But even these practices

would be countenanced only as a last resort. Among the elements that would be considered in the evaluation of corporate behavior were: the firm's record with respect to all applicable occupational safety and health regulations; its thoroughness in considering all scientifically recognized reproductive hazards—as they might affect both men and women—in the formulation of employment policies; the degree to which the excluded class of workers was at significantly greater risk than the nonexcluded class; the likelihood, based on available evidence, that members of the nonexcluded class would not suffer injury to their general health as a result of exposure to the toxic substance in question; the extent to which the employer had examined and attempted to implement alternatives to exclusion; and the firm's overall record with regard to gender-based discrimination. These criteria underscored two points of radical disagreement between the authors of the guidelines and those who had justified the exclusion of fertile women. First, reproductive hazards were not to be considered more significant than other occupational harms. Second, the potential risk to the fetus was not to be treated more seriously than risks to reproductive capacity itself. Fetal priority was thus dislodged.

Reflecting a preference for policies targeted at the production process itself, rather than at particularly susceptible workers, the guidelines stressed the implementation of engineering controls, the use of protective devices, and the elimination of fetotoxic substances, where possible. Finally, the guidelines recommended serious consideration of medical transfer by which workers shifted from settings that could result in fetal harm would retain seniority, wage, and benefit levels. Such a practice modeled after OSHA's Lead Standard Medical Removal Protection (MRP) policy would protect the worker against a loss of earning power, the fetus against harm, and the corporation against liability. The cost of such a practice would act as an incentive to innovation.

Although the guidelines were based on the assumption that a full scientific inquiry into the fetotoxic consequences of worker exposure would reveal paternal as well as maternal contributions, they acknowledged that current data might support the conventional view with its stress on female workers. Studies had rarely examined the effects of paternal exposure, assuming at the outset that only the mechanisms of harm to the fetus through maternal exposure required investigation. As a temporary measure, therefore, EEOC and OFCCP

were willing to consider the exclusion of pregnant women pending further research. But in such instances the guidelines mandated that new research be undertaken to uncover the possible detrimental consequences of paternal exposure. Two years were to be allowed for such studies, the cost of which was to be borne by corporations. When the cost of underwriting research became too great a burden, the corporations could call on OSHA and the National Institute of Occupational Safety and Health for assistance (Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs, 1979).

The official call for responses to the proposed regulations elicited a flood of formal reactions on the part of corporations, trade groups, labor unions, women's rights groups, and civil liberties organizations.[4] These statements reveal a bitter and divisive clash of social interests in the struggle over private and public policy toward reproductive hazards in the workplace. They reveal, in a striking fashion, the way in which moral arguments reflect social interests. They reveal the political topography of moral discourse.

Public Response to the Guidelines: The Clash of Social Interests

The comments submitted by corporations and industrial associations challenged every element of the proposed regulatory effort. Among those responding to the guidelines were the U.S. Chamber of Commerce, the American Industrial Health Association, the Chemical Manufacturers Association, the Pharmaceutical Manufacturers Association, the Lead Industries Association, and the Battery Council. Powerful corporations such as American Telephone and Telegraph, General Motors, Dupont, Dow Chemical, Exxon, Shell Oil, and Union Carbide also joined the attack on the proposed regulations. Pledging their support for equal employment opportunity and occupational health and safety, these respondents stressed that exclusionary practices should be relied upon only as a final resort, following efforts at

[4] The following references are taken from the formal comments submitted to the Equal Employment Opportunity Commission. All comments are on file at the commission in Washington, D.C.

engineering and administrative controls, the modification of work practices, and the use of personal protective equipment. Yet they saw the guidelines as profoundly flawed because, as Exxon asserted, they would "significantly enhance reproductive hazards in the workplace, greatly increase the cost of industry-sponsored medical research and testing, and expand certain areas of tort liability of employers subject to compliance."

From the perspective of business, the government's attempt to fashion an adequate response to reproductive hazards in the workplace had foundered because of the refusal of EEOC and OFCCP to acknowledge that teratogenesis was the consequence of the special and unique relationship between mother and fetus (Dow Chemical Company). Indeed, the effort to equate the potential paternal contribution to negative reproductive outcomes and the maternal contribution to embryo- and fetotoxicity was a fundamental error (Monsanto Corporation). And so the corporations repeatedly criticized and ridiculed the scientific pretensions and misconceptions that informed the guidelines.

The decision to allow for only narrowly tailored exclusions was termed "unconscionable" (Monsanto Corporation) and "morally irresponsible" (General Motors Corporation). By permitting fertile women, who might be pregnant, to work in toxic environments, the regulations were virtually assuring the unintended exposure of the embryo and fetus to hazards in the workplace (Chemical Manufacturers Association). Business interests repeatedly characterized the fetus as the unprotected victim of this shift in public policy and placed the claims of this "uninvited visitor" (Equal Employment Advisory Council) above those of the mother/worker. It was the mother/worker's obligation to provide "room and board" (Ethyl Corporation) and a "safe and healthy prenatal environment" for the fetus (Borg & Warner Chemicals); she could not exchange her concern for a job for its interest in health, safety, and life (Ethyl Corporation). The Synthetic Organic Chemical Manufacturers Association expressed in dramatic terms the underlying business assumption about the disjunction between the interests of the mother/worker and her biological charge: "Since the fetus derives no primary benefit from its unknown or known presence in the workplace, it should not be exposed to excessive risks. . . . This is a small price for mothers, potential mothers, and society to pay. . . ."

Because the guidelines sought to preclude corporate intervention on behalf of the fetus, they were characterized as paying undue attention to the concern of women about discrimination (Air Products & Chemicals Incorporated). EEOC and OFCCP had sacrificed the rights of the fetus and had endangered the well-being of future generations. There was simply no justification for subsuming a policy on reproductive hazards under Title VII of the Civil Rights Act (Shell Oil Company). Since exclusionary policies were based upon scientific and medical rather than social considerations, they could not be, by definition, discriminatory acts. To claim that fetal protection policies involved the abrogation of the federally guaranteed rights of women represented a disregard of congressional intent and would fasten the Civil Rights Act to policies with terrible consequences for the nation and humanity (Monsanto).

Corporations reacted with dismay to the stipulation that employers who took advantage of temporary emergency exclusion provisions engage in research into the male contribution to fetal harm. The Chamber of Commerce asserted that such scientific work would place impossible burdens on many companies. Indeed, most small businesses could not afford and were totally unequipped for such tasks. Further, it was unreasonable to assume that the investigations could be completed within the mandated two years (Chamber of Commerce). The Pharmaceutical Manufacturers Association, for example, estimated that such studies might be expected to take 56 months. One company, using the widely accepted assumption that the full testing of one chemical for mutagenic and teratogenic consequences would cost between $300,000 and $400,000 (Chemical Manufacturers Association), calculated that its research obligation could reach a staggering $1.4 billion (NALCO Chemical Company)!

What made this research requirement all the more unacceptable to the corporations was its unscientific premises. Nothing suggested that the failure to engage in balanced testing had resulted in a distorted picture of teratogenic outcomes (American Petroleum Institute). Social and not scientific considerations were being used to evaluate the adequacy of reproductive research. Political pressure was attempting to force useless expenditures on research into fetal harm (American Petroleum Institute). "No amount of legislation or regulation can equalize the risks associated with the reproductive cycle" (Pennzoil Company).

In addition to attacking these guidelines-mandated research costs, virtually every business response to the proposed regulations underscored the potential for tort liability that would follow the prohibition on excluding all fertile—as opposed to pregnant—women from fetotoxic environments. Since the exposed mother could not waive her potential child's right to sue for damages resulting from her exposure in the workplace, employers would confront a potentially ruinous tide of suits. If federal agencies sought "to expose employers to that kind of devastating tort liability," argued the Lead Industries Association, "Congress should enact legislation protecting companies from both legal expenses and the economic consequences of such suits." Congress could not be expected to provide such guarantees. And so, the American Petroleum Institute threatened that employers would have no alternative but to engage in endless litigation against the Equal Employment Opportunity Commission rather than face the costs of liability to future plaintiffs.

Added to the costs associated with potential liability suits and enforced research would be those tied to the requirement that "feasible" alternatives to the exclusion of pregnant women be explored before relying on so extreme an option. Alert to the nuances of language in the battle over occupational health and safety standards, corporate respondents saw the choice of "feasible" over "practicable" as indicating that federal bureaucrats would not permit reasonable cost considerations to play a role in determining the appropriateness of a given policy (Exxon).

In sum, these potential burdens upon business might lead to the avoidance of those production processes involving the use of fetotoxic substances, curtailment of business activity, and a concomitant loss of jobs. Ironically, regulations designed to expand employment opportunities for women would reduce the employment opportunities for both women and men (Chamber of Commerce).

Finally, employers stressed that both EEOC and OFCCP had overextended themselves, going far beyond their congressionally mandated rule-making authority. The guidelines represented yet one more instance of an ill-advised attempt by government to force complex issues into a rigid regulatory framework (Mechanical Contractors Association of America). And here the issues were so delicate that the intrusion of regulators could only be morally reprehensible. "Under what circumstances should the mother's interest supplant those of the unborn

child? Under what circumstances should the child's interest take precedence? Who has the legitimate claim to decide this profound moral and legal question? The mother? The federal government? The employers? It seems that the entity with the least claim is the federal government" (Borg-Warner).

Not only were the guidelines attacked by the corporate sector, which viewed them as an unwelcome effort by Washington to impose a regulatory regime, but they were also criticized by the opponents of corporate exclusionary policy. These challenges were of a very different sort, however, reflecting concern over what was seen as the too limited scope of the proposals. In the face of an assault on the rights of women workers, the guidelines were too ambiguous, too timid.

Most important was the statement of the Coalition for the Reproductive Rights of Workers (CRROW), representing a broad-based expression of antagonism toward all sex-based exclusionary practices. With explicit reference to Title VII of the Civil Rights Act, CRROW argued that neither Bona Fide Occupational Qualification nor Business Necessity Defense[5]—the two major defenses to charges of employment discrimination—could be used to justify excluding fertile women because of reproductive hazards. CRROW applauded the thrust of the guidelines, and their explicit link to Title VII, but feared that because of vague language they might be interpreted to permit the exclusion of a pregnant woman "to protect employers against liability should her child be born in some way deformed." Especially troubling was the framing of the temporary emergency exclusion provision. For CRROW, even the most narrowly tailored policy of exclusion required the full retention of earnings and seniority for affected workers, as in the Medical Removal Protection requirement of OSHA's Lead Standard. Without the enactment of such mandatory protections, CRROW asserted, it could not support the guidelines.

[5] When an employer adopts an employment practice that explicitly discriminates against women, that practice may be defended by arguing that gender bears a direct relationship to the capacity of women to perform given jobs. For example, refusing to hire women as models in a men's clothing store could be defended on the basis of Bona Fide Occupational Qualification. The Business Necessity Defense, on the other hand, is a judicially created doctrine and only comes to bear when employment practices that are not explicitly discriminatory have a disparate impact on women. Under these circumstances the employer must show that there is a demonstrable relationship between the challenged job criterion and successful performance.

These arguments were buttressed by the Women's Rights Project of the American Civil Liberties Union (ACLU). While not denying the *potential* for serious risk to fetal health as a result of parental—but especially maternal—exposure, the ACLU asserted that these risks had been overstated in order to justify exclusions. "We believe that the risk of birth defects is miniscule in most instances, and that there is a greater likelihood of miscarriage, infertility, and other similar reproductive anomalies." Indeed, the risks from smoking and alcohol consumption were probably greater, though no one had dared to interfere with the rights of pregnant women to consume these substances. Going beyond CRROW's insistence upon the maintenance of income and seniority rights for those who were at risk and who sought transfer or temporary leave during pregnancy or while attempting to conceive, the Women's Rights Project suggested that a libertarian commitment required more than protection. Most women, the ACLU claimed, would elect transfer with job and income security if informed of the risks to their pregnancies or fetuses. Yet some might choose to accept such risks, and they should be permitted to do so. Such freedom of choice would enhance workers' options. By contrast, the alternatives made available by corporations such as American Cyanamid were coercive; they were but the faintest imitations of freedom.

Finally, the ACLU responded to the corporate concern over potential tort liability by noting that companies using toxic substances had to contend with the possibility of suits by those living near their factories, as well as by male workers who believed that workplace exposure had resulted in birth defects in their children. With so many potential sources of liability, it was unacceptable to select one—fertile women—for elimination in the name of corporate fiscal security. Certainly, corporations could seek to insure themselves against liability here as they did in other cases. But more importantly, the ACLU "adamantly oppose[d] the proposition that [the avoidance of tort liability] may be [achieved] at the expense of workers' federally guaranteed rights to equality."

Trade unions representing workers in industries with exclusionary policies responded forcefully to the guidelines, often acknowledging their support for CRROW's position. The tone of the union remarks conveys outrage over the discrepancy between corporate concern for the fetus, yet insensitivity to the survival interests of women workers.

For the United Steelworkers, corporate exclusionary policies reflected not only selfish economic considerations, but the very sex stereotyping that civil rights laws were designed to restrict. Those who demanded the exclusion of all fertile women refused to acknowledge the ability of female workers to make responsible judgments. "It does not matter if the woman has chosen not to have a family, if her sexual partner has a vasectomy, or if she is practicing birth control." For the protection of profits, "corporations sought to create a 'liability-free' workplace." And the cost of creating such an environment was to be borne by the women who would be compelled to leave their jobs in order to preserve their abilities to bear children, by the women who would be denied employment in the first place. Why, asked the Steelworkers, had concern for a work environment free of reproductive hazards emerged only in settings that until recently had barred women? In the health care sector, where exclusion would require the replacement of virtually the total work force, either little fuss was made about reproductive risks or engineering controls were used to limit harmful exposure. The proposed guidelines were inadequate in the face of such an intolerable attack on the rights of women workers. Instead of asserting the unacceptability of all exclusionary policies, the provision for temporary emergency exclusion would provide a "good housekeeping seal" for inroads into equal employment.

Like the Steelworkers, the Autoworkers and the International Chemical Workers Union (ICWU) asserted that, despite the rhetoric of morality and the professed concern for the unborn, exclusionary policies were at root designed to protect corporate profits. The "moral imperative" of protecting the fetus was merely a "clever deception" (ICWU). Only medical removal protection was an acceptable option. Without denying that adoption of MRP would involve a financial burden for corporations, ICWU viewed such costs as preferable to the "more drastic and demonstrably tragic consequences of exclusion." Finally, the Oil, Chemical and Atomic Workers (OCAW), the union representing the workers at American Cyanamid, asserted that its experience with that "most belligerent employer" led it to conclude that the proposed guidelines were "completely unacceptable." For OCAW, the only remedy for exclusion was an ironclad prohibition on gender-based hiring and work assignments. Mandatory adoption of medical removal protection policies could be used to safeguard the

interests of workers while modifications in the production process were being implemented.

Trade union and feminist criticism was echoed in the remarks of key governmental bodies. Both OSHA and the National Institute of Occupational Safety and Health argued against temporary emergency exclusion and for medical removal protection. Of state agencies concerned with fair employment practices and occupational health and safety, surprisingly few submitted comments. Those that did shared OSHA's dissatisfactions (e.g., the California Department of Industrial Relations, Division of Occupational Safety and Health, and the Attorney General of Massachusetts).

There were, to be sure, some comments on the proposed guidelines that saw in them a laudable effort at meeting the legitimate claims both of women threatened by exclusionary policies and of those concerned with the full range of reproductive hazards, including fetal health and viability (e.g., the American Nurses Association and the Illinois Commission on the Status of Women). But these were strikingly in the minority. With the corporate world demanding withdrawal of the guidelines because they went too far and pro-feminist and trade union groups demanding that they be amended and strengthened, they were extremely vulnerable and would have faced an uncertain future in any event. The election of a conservative national administration hostile to the direction of OSHA policy under Eula Bingham, sympathetic to business interests, and committed to an antiregulatory posture, guaranteed that the EEOC and OFCCP effort would meet resistance. The decision by the Reagan government, within one month of its inauguration, to withdraw the proposed guidelines thus came as no surprise.

Reproductive Burdens and Public Policy

With the prospects for a regulatory prohibition on exclusionary policies foreclosed, litigation under the Civil Rights Act remains the primary avenue available for those who seek to thwart corporate policy. Given a conservative political climate, however, it is unlikely that the courts will assume an aggressively profeminist and prolabor stance in this complex arena where administrative guidance is lacking and where the scientific issues are so problematical. Confronted by a challenge

against the Olin Corporation, for example, a federal district court in North Carolina ruled in December 1980 that a fetal protection policy did not violate Title VII of the Civil Rights Act because it was "instituted for social and humane reasons, and [was] based upon sound medical knowledge and research" (*Family Planning/Population Reporter,* 1981). That case is now before the U.S. Court of Appeals for the 4th Circuit. In the Olin and American Cyanamid cases as well as in others presently under litigation, the issues involve the conflict between policies explicitly directed at protecting the fetus and provisions of the Civil Rights Act. Especially relevant are those amendments to the law that were enacted to limit labor practices which treated pregnancy differently from other medical conditions. The question central to these cases will be whether the Bona Fide Occupational Qualification and the Manifest Business Necessity defenses to charges of discrimination should be available as justifications for the exclusion of all fertile women from certain jobs. Since these carefully fashioned doctrines were designed to limit employment discrimination, making job performance the sole legitimate criterion of selection, considerable controversy has emerged among legal scholars about their applicability to practices directed at protecting the fetus (Williams, 1981; Howard, 1981; Furnish, 1980).

The judicial forum within which the issue of exclusionary policies is now being debated will force the conflict to take on a special character, tied to the language of current civil rights statutes. Beyond the legal issues, yet constitutive of them, is a broad and important sociopolitical question: Who ought to bear the burden of protecting the potential children of workers from the mutagenic and teratogenic risks associated with workplace exposure?

Ironically, in attempting to answer this question, both corporations and opponents of exclusionary practices seem to have reversed their characteristic positions on risk assessment and its implications for industrial policy. Typically, workers and their representatives have pressed management for the most extensive reductions in exposure levels to toxic substances. Further, they have maintained that uncertainty requires the most cautious assumptions about the possibility of harmful consequences. Corporations have responded by arguing that a risk-free environment is a chimerical notion and that the existence of uncertainty requires a willingness to tolerate levels of exposure that have not been proven harmful. Yet in relation to reproductive hazards

and, more especially, danger to the fetus, it is labor and its allies that have viewed with some skepticism the data on potential risk. Corporations, on the other hand, have adopted an almost alarmist perspective. What accounts for this reversal; for the interventionist stance of corporations with regard to the decisions that might be made by their female workers under conditions of possible risk; for the tendency of some unions, feminists, and political liberals to minimize the level of risk posed to the fetus directly through the mother, and hence to favor less restrictive employment practices?

When corporations argue that fetal protection requires absolute safety, that the cost of reducing workplace exposure so as to achieve such protection is too great to bear, that the widespread application of medical removal policies to men and women planning families would result in staggering expenditures, that the possibility of tort liability is potentially ruinous, those statements must be read as attempts to shift the economic burdens associated with childbearing in risky settings to those who may be temporarily or permanently deprived of jobs. When trade unions and feminist groups demand that fertile women and men be permitted to work in settings that may carry some risk, that corporations reduce the level of exposure to mutagenic and teratogenic substances so that the most vulnerable are protected, that workers planning families be provided with medical removal protection when there is an immediate prospect of harm, that tort suits be available to those who, despite protective efforts, bear defective children, such statements must be understood as claims on the disposable resources of those who own and manage businesses and on society as a whole.

Inevitably, public policy will determine the relative burdens to be assumed by workers, business, and the broader society. The comparative strength and influence of workers and business will determine the outcome in this instance, as it does in every conflict over occupational health and safety. The state may act, as it had done recently, by adopting a laissez-faire posture. But such a course will be neutral in form only. The pattern of American social advance generally has involved attempts by relatively disadvantaged groups and classes to mobilize the authority of government against the overwhelming strength of those with social power. The defense of laissez faire is the defense of those who can achieve their ends without the direct intervention of government. In the conflict over exclusionary policies,

women and their allies sought to thwart corporate practices with the aid of Washington. Employers opposed regulatory control as unwarranted and counterproductive. In a period marked by high unemployment and trade union vulnerability, there will be a few surprises as the state stands to the side while the clash over reproductive hazards takes place.

The outcome will be neither just nor effective. It will place the cost and burden of coping with reproductive hazards in the workplace upon women alone. And, ironically, because of its exclusive focus on female workers, it will fail to achieve the important social goal of protecting the unborn from work-related harm.

In recent years women have entered the labor market in unprecedented numbers. In large measure they have done so because of the pressures of economic life in the United States. Only recently have they succeeded in making inroads into well-paying jobs that formerly had been barred to them by law, tradition, and practice. Women therefore represent a vulnerable segment of the workforce, one that deserves special protections. Policies that may hinder or reverse their advance, however inadvertantly, must be subject to close scrutiny.

Though the scientific evidence is clouded with uncertainties, it seems clear that corporate policies attempting to limit negative reproductive outcomes exclusively through restrictions on the working lives of fertile women will have only partial success at best. A commitment to the reproductive health of workers and to the health and viability of their potential offspring will require work practices and social policies that consider the phasing of both maternal and paternal contributions to fetal health. Such measures will necessitate the recognition of periods—not always the same for men and women—of special vulnerability that require removal from toxic settings. But for such removal to be acceptable, the economic security of workers planning to have children will need protection.

Of course, significant risks and social costs would attend such policies. There will remain the problem of unplanned pregnancies among sexually active workers that may result in embryonic and fetal exposure. But to limit the employment opportunities of all fertile workers because of the potential for such accidents seems extreme and unwarranted. The costs of protecting the offspring of workers through a policy of medical removal protection would not be insignificant. But if the health of the fetus is to be a central public concern, no

other solution seems appropriate. To make private the burden of childbearing under hazardous working conditions by forcing workers to assume the costs through job loss or income reduction would involve a profound injustice. To make private the acceptance of significantly increased risk to fetal health by viewing such a choice as belonging to potential parents alone would represent a serious mistake. Reproductive hazards in the workplace are a social problem. They require a social solution.

Despite the sharp opposition between women and the corporate defenders of exclusion, they share an important though unspoken appreciation of the conditions of working-class life and the options available to blue-collar women. Both recognize that, given a chance, women would be willing to assume risks in order to improve or at least retain their earning capacities. In the name of equal opportunity, the defenders of women's rights have demanded the freedom to take on those risks. In the name of fetal health, corporations have sought to restrict the liberty of working women. Uniting the two sides of the conflict over reproductive hazards in the workplace is an awareness that the American economy so limits the possibilities of its women workers that they would demand—as a sign of liberation—the right to share with men equal access to reproductive risks. The appreciation of this fact explains the disquiet that informs the analyses of the most thoughtful antagonists of exclusionary policies. It gives the story of five women at American Cyanamid an irreducibly tragic dimension.

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